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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF MONTEREY

PAJARO VALLEY FEDERATION OF TEACHERS;
SAFE AG SAFE SCHOOLS;
CENTER FOR FARMWORKER FAMILIES;
MONTEREY BAY CENTRAL LABOR COUNCIL; and
CALIFORNIANS FOR PESTICIDE REFORM,

Petitioners and Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION, a state agency;
JULIE HENDERSON, in her official capacity as Director, Department of Pesticide Regulation;
MONTEREY COUNTY DEPARTMENT OF AGRICULTURE, a local agency;
JUAN HIDALGO, in his official capacity as Monterey County Agricultural Commissioner; and
DOES 1 through 10,

Respondents and Defendants,

and

BAY VIEW FARMS, LLC;
JUAN CARLOS FERNANDEZ, doing business as C & J Farms;
COASTAL VISTA FARMS, LLC;
JAL BERRY FARMS, LLC;
LA SELVA FARMS, LLC;
ROYAL OAKS FARMS, LLC; and
DOES 11 through 20,

Real Parties in Interest.

Case No.: 24CV001403

PETITIONERS' AND PLAINTIFFS' OPENING BRIEF

Dept.: 15
Judge: Hon. Thomas W. Wills
Hearing Date: July 14, 2025

Action Filed: April 5, 2024

This case has been designated as COMPLEX and assigned to a complex litigation judge.

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TABLE OF ABBREVIATIONS

1,3-D	1,3-dichloropropene
CalEPA	California Environmental Protection Agency
CCP	Code of Civil Procedure
CCR	California Code of Regulations
CEQA	California Environmental Quality Act
DPR	California Department of Pesticide Regulations
EIR	Environmental Impact Report
FAC	Food & Agricultural Code
OEHHA	Office of Emergency Health Hazard Assessment
PRC	Public Resources Code
RM	Restricted Materials
RMP	Restricted Materials Permit
THP	Timber Harvest Plan
U.S. EPA	United States Environmental Protection Agency
UCLA	University of California, Los Angeles

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INTRODUCTION

For decades, the Monterey County Agricultural Commissioner's (Commissioner) lax permitting practices have exposed schoolchildren, teachers, farmworkers, and communities in the Pajaro Valley to dangerous pesticides, including 1,3-dichloropropene (1,3-D) and chloropicrin. Chloropicrin and 1,3-D are highly toxic and volatile chemicals used to fumigate fields before planting. The California Department of Pesticide Regulation (DPR) has designated both as restricted materials (RM), which means they can only be used in accordance with a permit from the Commissioner following careful consideration of potential impacts to human health and feasible alternatives.

This case challenges the Commissioner's decision to issue 6 RM permits (RMPs) in 2023 that together authorized 12 applications of 1,3-D and chloropicrin in a single growing season within 1 mile of 3 local schools—Ohlone Elementary, Pajaro Middle, and Hall District Elementary. In granting the six permits, the Commissioner once again ignored the cumulative impact of his decisions by failing to view the permits in context with past, present, and future pesticide permitting near schools, in violation of the California Environmental Quality Act (CEQA). The Commissioner also failed to evaluate any alternative to approving the permits, in further violation of CEQA. The Commissioner's consistent refusal to undertake meaningful environmental review, and DPR's improper affirmance of the Commissioner's decisions on appeal, constitute a prejudicial abuse of discretion. Further, these CEQA violations are part of a broader pattern and practice of noncompliance with the law that has occurred across multiple prior permit cycles and will likely continue, warranting declaratory relief. For these reasons, the Court must reverse the permits and declare the Agencies' permitting practices in violation of CEQA.

FACTUAL BACKGROUND

Communities in rural Monterey County are at continual risk of exposure to dangerous pesticides. Monterey ranked sixth among California's 58 counties in pesticides applied in 2021, totaling more than 9 million pounds across 6.5 million acres of land. (Administrative Record

(AR)3160–3161; Proposed AR (PAR)8444-8445.[1]) Historically, Monterey has also had the highest rate of schools and students in areas with the greatest pesticide use than any other California county, with children in Monterey County among the most likely to attend schools near fields treated with restricted pesticides. (AR3189–3190.) All six permits challenged here authorize the use of RMs within a mile of Ohlone Elementary, Hall District Elementary, or Pajaro Middle School, within the county's Pajaro Valley. (AR16–18; DPR's Answer ¶2.)

Chloropicrin and 1,3-D are the most used RMs in Monterey County. (AR3534, 3539.) In 2021, growers applied over 2,000,000 pounds of chloropicrin and over 700,000 pounds of 1,3-D in the County. (AR3534, 3539.) Both chloropicrin and 1,3-D are fumigants that volatilize into a toxic gas that kills fungi, bacteria, insects, weeds, and nematodes. (AR29, 4117-4118.) But the properties that make 1,3-D and chloropicrin effective pest control agents also make them dangerous. (AR4097.) Natural "chimneys" underground create exposure pathways by "allow[ing] the soil fumigants to move through the soil quickly and escape into the atmosphere," which "may create potentially harmful conditions for workers and bystanders," including schools, homes, and communities. (AR648, 4097, 4099.) Volatilized gases can drift more than a mile from application sites, with DPR documenting significant levels of 1,3-D seven-and-a-half miles away from an application site in Kern County. (AR4240-4241; DPR's Answer ¶42; PAR6863-6877, 7034–7050, 7100-7135, 7155-7157.) There have been numerous mass casualty events associated with 1,3-D and chloropicrin. (PAR5925–6823.)

The various formulations of 1,3-D and chloropicrin are acutely toxic and "highly hazardous." (AR640, 642; DPR's Answer ¶39; PAR5889–5895, 7051–7084, 7152–7154, 7158–7338.) Based on toxicity ratings of 1 to 4 (with 1 being the most toxic), 1,3-D and chloropicrin have a Category 1 rating for acute inhalation, are "fatal if inhaled or swallowed," and can cause "serious eye irritation" from vapor contact or "damage to the respiratory system from single exposure or through prolonged or repeated inhalation exposure." (AR29.) Damage to eyes, nose, and throat will occur after exposure to "very low concentrations of vapor," and will occur "either

[1] Petitioners have filed a Motion to Augment the record contemporaneous with this brief. Citations to the PAR are to the Bates numbered volume accompanying that motion.

directly or through drift." (AR642–643.) Exposure can also damage organs, including the lungs, liver, and kidneys. (AR582.)

California has further identified 1,3-D and chloropicrin as potent genotoxins, carcinogens, and toxic air contaminants that "may cause or contribute to an increase in mortality or an increase in serious illness, or which may pose a present or potential hazard to human health." (AR3251–3254, 3248; DPR's Answer ¶39 [citation omitted].) A panel of independent experts characterized the risk of cancer from chloropicrin as "very high." (AR3253.) CalEPA has likewise recognized the "large body of work demonstrating the carcinogenic potential of 1,3-D in a range of tissue types, including the lungs, bladder, liver, and forestomach." (AR3249.)

Additionally, "cumulative exposures can have larger than anticipated impacts on public health." (AR4097; DPR's Answer ¶41.) There is a "likelihood that many bystanders exposed to 1,3-D will simultaneously be exposed to chloropicrin." (PAR8438.) Where chloropicrin and 1,3-D are applied "in close geographic or temporal proximity," the active ingredients may synergize with one another or other contaminants, forming products that have additional or more toxic health effects. (AR4107, 4113; PAR5896–5905.)

Moreover, prenatal pesticide exposure to pesticides in general is associated with an elevated risk of fetal death due to congenital anomalies, along with an increased risk of surviving children having neuropsychological and motor development disorders, asthma-like respiratory symptoms, lower intelligence quotient, lower cognitive function, childhood central nervous system tumors, and leukemia. (PAR5906–5924, 6826–6833, 6878–7033, 7085–7135, 7136–7143.)

Air monitoring at Ohlone Elementary has documented significant quantities of 1,3-D, chloropicrin, and other pesticides every year since monitoring began in 2012. (AR38; PAR7809–7962.) Results for 1,3-D averaged annually were more than double the lifetime cancer risk level set by DPR's sister agency, the Office of Emergency Health Hazard Assessment (OEHHA), over the course of monitoring between 2012 and 2022. (AR38; DPR's Answer ¶38.) The monitoring station originated as part of a settlement between DPR and U.S. EPA to a 1999 complaint under Title VI of the Civil Rights Act of 1964, concerning racial discrimination by DPR in Monterey

County in connection with disproportionate use of another restricted fumigant (methyl bromide) within 1.5 miles of area schools—including Pajaro Middle and Ohlone Elementary—and the failure to address cumulative impact of such exposure. (AR4137–4183, 4189–4196.) The settlement followed U.S. EPA's preliminary findings in 2011, upholding the complaint. (AR4184–4188.)

THE PESTICIDE PERMITS AT ISSUE

The Commissioner issued 6 RMPs between July 13 and August 14, 2023, all of which authorize fumigations with 1,3-D and chloropicrin on 12 ranches within 1 mile of the 3 Pajaro Valley schools. (AR278–292, 788–811, 1117–1127, 1729–1743, 2310–2322, 2946–2959; Addendum 3 [maps showing ranch locations].)[2] The permits include the applicants' boilerplate attestations that they have "[t]ak[en] into account...environmental...factors" and adopted feasible mitigation measures that "would substantially lessen any significant adverse impact on the environment," without discussing the nature of any impacts considered and without any written analysis by the Commissioner. (AR89, 282.) The permits do not mention cumulative impacts and include no findings or other evidence of any environmental review conducted by the Commissioner. The permits also include the applicants' boilerplate attestations that they considered and adopted feasible alternatives. (AR282.) Alternatives and Mitigation Measures Considered forms submitted with the permit applications collectively document the existence of more than a dozen non-chemical and reduced-risk chemical alternatives to alternatives to 1,3-D and chloropicrin, without any explanation as to these alternatives' infeasibility or other bases for rejection, and without discussion of a "no project" alternative. (AR49, 93–94, 637–638, 965–966, 1497–1498, 2125–2126, 2680–2681.) The bulleted lists generally consist of one- to two-word entries, such as: "Sanitation," "Crop rotation," and "Mulch." (See AR49.) In addition to the 12 ranches covered by the 6 RMPs at issue, several growers signaled their intentions to obtain future RMPs for the 2023-2024 growing season to apply 1,3-D, chloropicrin, and other pesticides on more ranches within 1 mile of the 3 schools. (PAR8331–8435.)

[2] For ease of reference, the C&J Farms permit is appended hereto as an exemplar permit and this brief cites to the C&J Farms permit where the contents are the same across all six RMPs.

The six permits at issue are similar to permits issued for the 2022–2023 growing season, in which the Commissioner issued 13 RMPs allowing the use of various RMs on 23 ranches within 1 mile of the three schools, and permits issued for the 2021–2022 growing season, in which the Commissioner issued 13 RMPs allowing the use of RMs on 25 ranches within 1 mile of the three schools. (AR51–56, 323–326; PAR7963–8330; Addendum 3.) Some of the RMPs authorized the use of RMs on the same ranches in all three consecutive growing seasons between 2021 and 2024. (AR53–56.) Petitioners brought an administrative challenge to the 2022 set of permits, pointing to the 2021 permits as further evidence cumulative impacts, (AR316–365), but both the Commissioner and DPR affirmed those RMPs. (AR294–315; PAR7348-7361.)

LEGAL BACKGROUND

Registering a pesticide for potential use in California and permitting certain pesticides' use in specific circumstances are two different roles performed by two different lead agencies—DPR, for pesticide registration, and county agricultural commissioners, for permitting (collectively, the Agencies). (Food & Agricultural Code [hereafter FAC], §§ 12811, 14006.5.) Together, the Agencies' duty is to "protect the environment from environmentally harmful pesticides by prohibiting, regulating, or ensuring proper stewardship of those pesticides." (*Id.*, § 11501, subd. (b).)

Along with registering pesticides, DPR must also designate certain pesticides as RMs based on their particularly "injurious" nature, such as extraordinary "[d]anger of impairment of public health" or "[h]azards to applicators and farmworkers." (*Id.*, §§ 14004.5, subds. (a)-(b), 14005; PAR6824–6825.) "'[R]egistration of a [RM] is not in itself a right to use the pesticide, but rather a [DPR] determination that under appropriate local conditions the commissioner can grant a use permit for the material.'" (*Vasquez v. Dept. of Pesticide Reg.* (2021) 68 Cal.App.5th 672, 678 [quoting 3 Cal. Code Regs. [hereafter CCR], § 6442, subd. (a)].)

Instead, it is the commissioners' responsibility to determine, consistent with CEQA and the implementing program under the FAC, whether to issue permits allowing the use of RMs in the specific circumstances proposed in the permit applications. (FAC, § 14006.5.) RMPs are annual in nature, running from the date of issuance through January 31 of each year. (*Id.*,

§ 14007, subd. (b); AR282.) With limited exceptions, "no person shall use or possess any pesticide designated as a [RM] for any agricultural use except under a written permit of the [county agricultural] commissioner." (FAC, § 14006.5; see also 3 CCR, § 6412, subd. (a).)

The Food and Agricultural Code operates in tandem with CEQA. CEQA is a comprehensive statute "designed to fulfill the…goal of long-term preservation of a high quality environment for the citizens of California" and ensure "that major consideration is given to preventing environmental damage…" (*Pesticide Action Network North America v. Depart. of Pesticide Regs.* (2017) 16 Cal.App.5th 224, 242, as modified on denial of reh'g (Oct. 19, 2017) [hereafter *PANNA*]; PRC, § 21000, subd. (g).)

The Legislature declared its intent in 1978 for environmental review of pesticides to occur as part of a certified regulatory program under CEQA. (AR378–379.) The pesticide regulatory program would be exempt from preparing environmental impact reports (EIRs) or functionally equivalent documents subject to public notice and comment (AR379–380) but still needed to comply with CEQA's environmental review requirements (AR380). The Legislature recognized that the safe use of pesticides was "essential" to protecting human health and acknowledged that reasonable environmental review was "prudent and appropriate." (AR378.) DPR obtained certification of the pesticide regulatory program in 1979. (AR384-404.)

Certified regulatory programs must "demonstrate strict compliance" with both the "broad policy goals and substantive standards" of CEQA and relevant implementing statutes and regulations. (*PANNA*, *supra*, 16 Cal.App.5th at p. 242; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 113, 132.) Lead agencies in certified regulatory programs must consider the potentially significant adverse effects of proposed projects on the environment (including effects that are cumulatively considerable), alternatives to the proposed project, and mitigation measures. (*PANNA, supra,* 16 Cal.App.5th at pp. 240, 248; *Laupheimer v. State of California* (1988) 200 Cal.App.3d 440, 462-463.) Likewise, certified regulatory programs remain subject to "the policy of avoiding significant adverse effects on the environment where feasible." (*PANNA, supra,* 16 CalApp.5th at p. 241 [citation omitted].)

Implementing CEQA, the FAC additionally requires county agricultural commissioners (with DPR's oversight) to "consider local conditions," including "[u]se in vicinity of schools," and evaluate whether such conditions warrant issuance of a permit or mandate the permit's denial. (FAC, §§ 14006.5, 12825) Likewise, the FAC makes "the protection of the public health, safety, and welfare" a primary purpose of the Code, requiring liberal construction of its provisions to accomplish that purpose. (FAC, § 3.) The FAC further prohibits RMPs if the Commissioner determines that "[t]he pesticide has significant adverse environmental effects for which there is no feasible mitigation available." (FAC, § 14006.5, subd. (a) [cross-referencing FAC, § 12825, subd. (a)(1)].)

Despite CEQA's applicability to RMP issuance, researchers at the University of California, Los Angeles (UCLA) documented in 2019 that county agricultural commissioners routinely permit the use of RMs with only perfunctory environmental review. (AR4197–4236.) The researchers documented their findings that commissioners throughout the State "do not consider cumulative exposure during the [RM] permitting process," and "improperly delegate their responsibility to identify and evaluate potential alternatives to third parties such as pest control advisors..." (AR4202–4203.) The commissioners "receive no guidance from DPR regarding cumulative exposure" and issue pesticide permitting decisions whose underlying basis is "impenetrable." (AR4202–4303.)

PROCEDURAL HISTORY

Pursuant to FAC section 14009, subd. (a), Petitioners, a coalition representing teachers, parents, and farmworkers, requested that the Commissioner review the six permits at issue on August 11, 2023 and August 14, 2023. (AR36–64, 1435–1460.). In their request, Petitioners provided the Commissioner with studies and reports demonstrating that the permits at issue could have a significant adverse impact on human health that needed to be addressed in accordance with CEQA. (AR39–40; see generally Motion to Complete.) Petitioners also flagged that the Commissioner had granted numerous permits to apply 1,3-D and chloropicrin within 1 mile of the same schools in prior years. Petitioners urged the Commissioner to consider the cumulative impact of his many permitting decisions, as well feasible alternatives to continued

fumigations. (AR48–57.) Petitioners also alerted the Commissioner to a 2016 report by researchers at UCLA, which found that repeat exposure to 1,3-D and chloropicrin can have a serious cumulative impact on human health. (AR40–41, 4093–4136.)

Between August 28 and 30, 2023, the Commissioner issued separate decisions affirming each permit and denying Petitioners' request for review. (AR27–35, 580–588, 913–921, 1425–1434, 2034–2042, 2610–2619.) All six decisions are substantively similar.[3] The Commissioner claimed an exemption from any duty to provide written findings and claimed that DPR reviews cumulative impacts rather than purporting to analyze the cumulative impact of the RMPs near the Pajaro Valley schools. (AR32–33.) As to alternatives, the Commissioner acknowledged that "considerable research efforts in the last decade have focused on developing non-fumigant alternatives," but claimed that "[c]hloropicrin and [1,3-D]…remain in most cases the only feasible and viable method of pest control available for pre-plant strawberry field preparation." (AR33–34.) Further, the Commissioner's decisions categorically denied his authority to issue a stay of challenged RMPs. (AR27.)

Pursuant to FAC section 14009, Petitioners appealed the Commissioner's decisions to DPR on September 22, 2023.[4] (AR1–23.) Petitioners sent a follow-up letter to DPR in October 2023 while their appeal was pending, identifying four newly issued RMPs for the 2023–2024 growing season within one mile of the three schools, with identical deficiencies as those in the six appealed RMPs. (PAR7360–7808.) DPR issued its merits decision on March 6, 2024, upholding the permits. (AR5860–5888.) This lawsuit followed.

STANDARD OF REVIEW

Review of RMPs is pursuant to Code of Civil Procedure section 1094.5, except that review is "limited to whether the proposed permit use is consistent with applicable pesticide label restrictions and regulations and whether [DPR] abused [its] discretion." (FAC, § 14009,

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[3] The six permit decisions are identical in relevant part. Petitioners cite to the exemplar decision for C&J Farms, appended hereto, for references intended to encompass all six farms.

[4] Due to a typographical error, Petitioners' notice of appeal is incorrectly dated October 21, 2023. (See DPR's Answer ¶ 64 [admitting Petitioners submitted their appeal in September 2023].)

subds. (a)(1), (g).) As DPR's duty was "to review the commissioner's action" in issuing the six RMPs, this Court likewise reviews the Commissioner's action in assessing abuse of discretion, and not subsequent rationale in the Commissioner or DPR's later administrative decisions. (FAC, § 14009, subd. (a)(1); *POET, LLC v. State Air Res. Bd.* (2013) 218 Cal.App.4th 681, 715.)

An agency abuses its discretion if it fails to proceed "in the manner required by law," "the order or decision is not supported by the findings," or "the findings are not supported by the evidence." (Code Civ. Proc. [hereafter CCP], § 1094.5, subd. (b).) The Court exercises independent review over claims of legal error and reviews factual errors for substantial evidence. (CCP, § 1094.5, subd. (c); *PANNA, supra,* 16 Cal.App.5th at p. 238.) "When the informational requirements of CEQA have not been met, an agency has failed to proceed in a manner required by law and has therefore abused its discretion." (*John R. Lawson Rock & Oil, Inc. v. State Air Res. Bd.* (2018) 20 Cal.App.5th 77, 96.) "In assessing such a claim, courts apply an independent or de novo standard of review to the agency's action." (*Ibid.*)

ARGUMENT

I. The Commissioner Violated CEQA by Ignoring the Cumulative Impact of Pesticide Permitting Near Schools.

The Commissioner issued the six challenged permits without making any findings as to *whether* cumulative impacts exist, *what* those impacts are, and *why* those impacts were or were not significant. Nor did he dispute these failings in his post-permit decisions on Petitioners' request for review. To the extent the Commissioner may attempt to justify his lack of findings by claiming that findings were not required or DPR already conducted an adequate cumulative impacts review, these claims are incorrect. The Commissioner's failure to meaningfully consider cumulative impacts violated CEQA and reflects an abuse of discretion requiring reversal. Such failure is a legal error that this Court reviews de novo. Petitioners bear the burden of proving abuse of discretion by a preponderance of the evidence. (Evid. Code, §§ 115, 500.) At the same time, this Court should presume that cumulative impacts will be significant in light of DPR's RM guidance, which shifts the burden to the Agencies to rebut the presumption. (AR443.)

A. The Permits and the Commissioner's Decisions Contain No Findings on Cumulative Impacts Despite Ample Evidence of Their Significance.

Findings on cumulative impacts are absent from the six challenged RMPs and the Commissioner's subsequent decisions on Petitioners' request for review.

Cumulative impacts are "an integral part" of the analysis required under the pesticide certified regulatory program. (*PANNA, supra,* 16 Cal.App.5th at p. 248.) Lead agencies "must consider each [proposed action] in its full environmental context and not in a vacuum," and must consider the potential incremental effects of a proposed project on existing environmental problems viewed in light of similar past, present, and probable future projects. (*Id.* at p. 249 [citation omitted].) A cumulative impacts analysis must be substantively meaningful, reflecting "adequacy, completeness, and a good faith effort at full disclosure." (*Id.* at p. 250 [citation omitted].) The review must include (1) "a preliminary search for potential cumulative environmental effects," (2) "at least a preliminary assessment of…significance" for potential effects perceived, and (3) "careful consideration" of reasonably significant effects in determining whether to grant project approval. (*Id.* at p. 249.)

There is no evidence that the Commissioner followed any of these steps. Petitioners presented the Commissioner with ample evidence of significant cumulative impacts from the permits, including:

- the 6 challenged 2023 permits authorized 12 additional applications of 1,3-D and chloropicrin surrounding the 3 schools in a single year—including 4 fumigations within 1 mile of Ohlone Elementary (AR55), 7 fumigations within 1 mile of Pajaro Middle (AR54), and 1 fumigation within 1 mile of Hall District Elementary (AR56); the Commissioner issued additional RMPs within 1 mile of the three schools while Petitioners' appeal was pending (PAR7360–7808); and growers signaled the potential for future RMPs authorizing additional fumigations during the 2023-2024 growing season (PAR8331–8435);
- the history of similar permits issued in previous years in the general vicinity, including 13 RMPs authorizing applications of 1,3-D, chloropicrin, other RMs on 23

ranches within 1 mile of the 3 schools during the 2022–2023 growing season (AR51–56; PAR7963–8149), and 13 RMPs authorizing similar applications on 25 ranches in the same vicinity for the 2021–2022 growing season (AR51–56, 323–326; PAR8150–8330);

- the history of pesticide-related air pollution in the general vicinity, including years of monitoring data captured at Ohlone Elementary School (the only one of the three schools with an onsite monitor) showing measurements of 1,3-D exceeding OEHHA's lifetime cancer risk level, along with significant air pollution from chloropicrin. (AR31, 38; DPR's Answer ¶38; PAR7809–7962);
- the similarity and toxicity of the RMs authorized in the permits (1,3-D and chloropicrin, which are both fumigants causing respiratory impacts via inhalation), and their potential for greater interactive effects (AR4218–4219; PAR5896–5905);
- the potential for these RMs to volatilize and drift offsite at distances of 1 mile and greater (AR4117; DPR's Answer ¶42; PAR6863-6877, 7034-7050, 7100–7135, 7155–7157);
- mass casualty reports regarding actual harm caused by applications of 1,3-D and chloropicrin in Monterey County (PAR5925–6823); and
- the special vulnerability of children to the negative health effects of pesticide pollution (PAR5906–5924, 6826–6862, 6878–7033, 7085–7135, 7136–7151).

This evidence demonstrates a reasonable likelihood that the collective permitting actions would expose schoolchildren in particular to a significant incremental risk of respiratory harm, requiring the Commissioner's "careful consideration." (*PANNA, supra,* 16 Cal.App.5th at p. 249; see also *id.* at pp. 246–247 [Fair argument standard applies in determining when an activity "may have a significant environmental effect."]; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120, as modified (Nov. 21, 2002) [explaining that "the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant"], disapproved on other grounds by *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.) At

minimum, Petitioners' evidence should have been part of the Commissioner's "preliminary assessment" of cumulative impacts. (*PANNA, supra,* 16 Cal.App.5th at p. 249.)

Even so, the permits themselves say absolutely nothing about the potential for cumulative impacts. In fact, the permits contain no findings at all. The permits simply contain the growers' vague, boilerplate attestations, condensed into two conclusory sentences, that *the growers* (1) "considered alternative[s] and mitigation measures," and (2) "adopted those that are feasible and would substantially lessen any significant adverse impact on the environment," with no discussion of what those impacts might be. (AR282.) In his decisions on Petitioners' request for review, the Commissioner does not dispute the lack of findings in the permits and does not claim that he conducted any review of cumulative impacts whatsoever prior to issuing the permits. (See generally AR27–35.)

The only mentions of cumulative risk from the decisions come from (1) a claim that *DPR* considers cumulative impacts (discussed further below) (AR33), and (2) a passing assertion that "[p]esticide label requirements, permit conditions, and current agricultural practices aid in mitigating potential cumulative risks." (AR31.) Neither statement reflects any consideration of cumulative impacts *by the Commissioner* in the specific context of the six RMPs. *PANNA*, which considered DPR's compliance with CEQA in approving amended pesticide labels, rejected a similar "one-sentence [cumulative impacts] response" from DPR that "lacked facts and failed to provide even a brief explanation about how [DPR] reached its conclusion." (*PANNA, supra,* 16 Cal.App.5th at p. 250.)

Moreover, the Commissioner issued six individual responses to Petitioners' single combined request for review of the six RMPs, taking pains to discuss each permit in isolation, with each of the six decisions proceeding as if none of the other RMPs exists. (AR27-35, 580–588, 913–921, 1425–1434, 2034–2042, 2610–2619.) The Commissioner's failure to acknowledge and discuss these contemporaneous permits together is sufficient by itself to prove a procedural CEQA violation warranting the permits' reversal for abuse of discretion. (See *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 490 [stating that a cumulative impacts analysis may not proceed "in such general terms that the 'big picture'…is missing from

the analysis"—i.e. that the project would be "located next to" another project of the same kind]; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1213–1214 [rejecting consideration of two proposed neighboring shopping centers "in isolation" as "fundamentally flawed"].)

The Commissioner's failure to engage in the required analysis is particularly egregious in view of DPR's guidance establishing a presumption that impacts from the use of RMs will be significant (AR443), added together with the evidence the Commissioner ignored concerning baseline air pollution levels in the vicinity, permit history, proximity of the schools, toxicity of the RMs at issue, and propensity for volatilization and drift. (See, e.g., *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 77 [rejecting cumulative impacts analysis based on "[t]he disparity between what was considered and what was known"].)

Petitioners have demonstrated at least a "fair argument" that the six permits together may have a significant cumulative impact. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720, reh'g denied and opinion modified (July 20, 1990) [stating that "small sources" of air pollution may appear insignificant individually, "assuming threatening dimensions only when considered in light of the other sources with which they interact"].)

B. The Commissioner's Excuses for His Lack of Findings on Cumulative Impacts Are Unavailing.

The Commissioner's decisions contain two statements that might be construed as excuses for his failings—(1) a claim that he was not required to document his environmental review (AR32–33), and (2) a claim that DPR already conducted a cumulative impacts review (AR33–34). Both are wrong.

1. The Commissioner Needed to Document the Basis for Any Conclusions Regarding Cumulative Impacts.

Written findings explaining the basis for the Commissioner's decision to issue each of the six challenged permits and showing the permits' compliance with the CEQA certified regulatory

program for pesticide regulation were mandatory. Such findings needed to discuss cumulative impacts and needed to occur prior to or contemporaneous with the permits' issuance.

Judicial review under section 1094.5 necessarily requires that an agency articulate sufficient findings "to bridge the analytic gap between the raw evidence and ultimate decision or order," so the trial court can fulfill its judicial review mandate. (*Topanga Assn. for a Scenic Community. v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [In Bank] [emphasizing section 1094.5's focus on "the relationships between evidence and findings and between findings and ultimate action," which "leaves no room for" speculation].) The agency must reveal the "route" it traveled "from evidence to action" and must "draw legally relevant sub-conclusions supportive of its ultimate decision." (*Id*. at pp. 515–516.) The *Topanga* Court specifically reached this conclusion "regardless of whether" any underlying law "commands that the [action agency] set forth findings." (*Id.* at p. 514.)

Topanga articulated generally applicable rules for all quasi-judicial administrative actions. (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 778–779 [In Bank].) An environmental review that contains "no analysis" of CEQA's key requirements fails *Topanga*'s standards. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404; see also *McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 940–941, as modified (Jan. 20, 2009) [Sixth District case applying *Topanga* to a permitting dispute involving a certified regulatory program].)

Since issuance of a RMP is a quasi-judicial decision subject to review under CCP 1094.5, *Topanga* applies. (FAC, § 14009, subd. (g).) Thus, the Commissioner needed to issue sufficient findings to enable judicial review, regardless of whether the pesticide regulatory program was exempt from preparing an EIR or functionally equivalent document subject to public notice and comment. (AR377–383.) Consistent with the nature of cumulative impacts review in certified regulatory programs, the Commissioner's findings needed to include conclusions as to which potentially significant adverse environmental effects he considered and further explain any conclusion that such effects would be less than significant. Likewise, the findings had to show

the Commissioner's analytical route and the legal theory on which he relied. (*Topanga, supra*, 11 Cal.3d at pp. 514–515.)

As discussed above, findings as to cumulative impacts are absent from both the permits themselves and the Commissioner's decisions on Petitioner's request for review. Moreover, "findings" in the Commissioner's decisions on Petitioners' request for review or DPR's decision following Petitioners' administrative appeal would be post-hoc rationalizations insufficient to remedy the Commissioner's prejudicial error. (See *Friends of the Old Trees v. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1401–1402 [hereafter *Old Trees*] [rejecting a later response to excuse a missing cumulative impacts analysis in a certified regulatory program]; *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515 [stating that "harmless error analysis is inapplicable" when an agency "subverts" CEQA's procedural requirements by omitting necessary materials].)

2. DPR's Program Level Review of RMs Cannot Substitute for the Commissioner's Permit Level Analysis of Cumulative Impacts.

The Commissioner's decisions claim that DPR's scientists "assess…cumulative effects pesticides have on humans and the environment" at the *program* level, implicitly disclaiming his own independent duty to consider cumulative impacts at the *permit* level. (AR33). In particular, the Commissioner pointed to labeling requirements imposed by DPR at the registration level, standard permit terms and conditions, and various regulations detailing standards and limitations on the use of 1,3-D and chloropicrin as evidence of mitigation measures that will allegedly reduce cumulative impacts to less than significant. (AR34). Yet none of these records provide any evidence relevant to assessing the existence and significance of cumulative impacts in the context of the six challenged permits, let alone whether they are mitigable.

It is well settled that "DPR[']s registration does not and cannot account for specific uses of pesticides…such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas targeted for application, and the like." (*Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 956 [citation omitted].) Likewise, DPR's registration does not guarantee that use of a pesticide "will never have significant

environmental effects." (*Ibid.*) Instead, DPR's certified regulatory program "is in essence the master plan for pesticide registration, evaluation and regulation," which "does not, nor was it intended to, address the environmental impacts of administering a statewide pesticide application program backed by the full force of the [Department of Food and Agriculture] and the county agricultural commissioners." (*Californians for Alternatives to Toxics v. Dept. of Food & Agriculture* (2005) 136 Cal.App.4th 1, 17 [hereafter *Toxics*]; see also *PANNA, supra,* 16 Cal.App.5th at p. 250 [stating that "the Department's approach appears to have been to simply put off altogether considering the cumulative effects"].)

In *Toxics*, the Court rejected DFA's reliance on DPR's certified regulatory program—including DPR's regulations, pesticide labels, material safety data sheets, and requirements for professional application—"as a substitute for performing its own evaluation" of environmental impacts in the context of an emergency pest control program related to wine grapes. (*Toxics, supra,* 136 Cal.App.4th at pp. 15–19.) The Court complained that DFA "only cursorily treat[ed] toxicology, behavior in the environment and human exposure experience" and "[did] not analyze how potential effects could impact people and the environment under the [specific regulatory program at issue]." (*Id.* at p. 18.)

Toxics is directly on point, as any consideration of cumulative impacts by the Commissioner in the present case rested entirely on the same types of program-level materials the *Toxics* Court rejected as insufficient. That DPR may have assessed the environmental effects of 1,3-D and chloropicrin *in general* and registered them for use cannot equate to the Commissioner's consideration of their cumulative effects when viewed in the specific context of the six RMPs, including their relation to other past, current, and probable future permits. (See also *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 712–713 [stating that lead agencies have a non-delegable duty to conduct environmental review under CEQA].)

For all of the above reasons, the Commissioner failed to meaningfully consider cumulative impacts as a matter of law, and the six RMPs must be reversed.

II. The Commissioner Failed to Consider Alternatives.

The Commissioner also failed to undertake a meaningful evaluation of alternatives, in further violation of CEQA. The Commissioner failed to issue written findings on alternatives before issuing the six permits. Nor did the Commissioner's post-hoc denials of Petitioners' request for review reflect consideration of a reasonable range of alternatives or properly assess their feasibility. These failures constitute legal and procedural error under the CEQA certified regulatory program and must be reversed. (*Sierra Club v. County of Fresno*, *supra*, 6 Cal.5th at p. 515.)

These claims are properly reviewed de novo. (*Id.* at pp. 513–514.) Additionally, decisionmakers in certified regulatory programs have "the burden of affirmatively demonstrating" their meaningful consideration of alternatives, "notwithstanding a project's impact on the environment." (*Mountain Lion, supra,* 16 Cal.4th at p. 134.)

A. The Commissioner Failed to Issue Required Findings on Alternatives Contemporaneous with the Six Permits.

As with cumulative impacts, the Commissioner failed to issue findings reflecting *any* analysis of alternatives contemporaneous with the permits. The Commissioner's failure "to bridge the analytic gap" between the evidence and his action constitutes reversible legal error. (*Topanga*, *supra*, 11 Cal.3d at pp. 514–515.)

CEQA requires agency consideration of a reasonable range of alternatives (*PANNA, supra,* 16 Cal.App.5th at p. 245) and the FAC precludes permit issuance where "[t]here is a reasonable, effective, and practicable alternate material or procedure for the pesticide that is demonstrably less destructive to the environment." (FAC, § 14006.5, subd. (a) [cross-referencing FAC § 12825, subd. (a)(3)].) The Commissioner therefore needed to issue findings containing "sub-conclusions" reflecting the range of alternatives he considered and their feasibility in the context of the six challenged RMPs. (*Topanga, supra,* 11 Cal.3d at pp. 515–516.)

Instead, the permits contained only the growers' assertions that the *growers* considered alternatives, in the form of a cursory list of alternatives allegedly considered with no detail

explaining why the growers rejected those alternatives as infeasible. These statements cannot be imputed to the Commissioner. (*Friends of the Eel River*, *supra*, 3 Cal.5th at pp. 712–713.) There are simply no findings *by the Commissioner* indicating that he conducted any analysis or reached relevant sub-conclusions regarding the range and feasibility of alternatives considered. These omissions are reversible error.

B. The Commissioner's Post-Hoc Analyses Omitted a Feasibility Analysis and Ignored the "No Project" Alternative.

As discussed in Issue I, the Commissioner's post-hoc decisions on Petitioners' request for review cannot render harmless his lack of findings at the time of the permits' issuance. (*Sierra Club, supra,* 6 Cal.5th at p. 515; see also *POET, supra,* 218 Cal.App.4th at p. 715 [holding, in review under certified regulatory program, that evaluation of alternatives must occur *before* an agency approves a project].) Assuming arguendo that these decisions could qualify as proper findings, they were procedurally flawed because the Commissioner summarily rejected all potential alternatives to RMs without meaningfully considering their feasibility and failed to consider a "no project" alternative.

"[C]onsideration of alternatives is one of the hallmarks of CEQA analysis." (*PANNA*, *supra*, 16 Cal.App.5th at p. 245; PRC, § 21001, subd. (g).) The requirement to undertake a proper alternatives analysis applies to certified regulatory programs. (*Mountain Lion*, *supra*, 16 Cal.4th at p. 134.) This responsibility "is not dependent in the first instance on a showing by the public that there are feasible alternatives" (*Laurel Heights*, *supra*, 47 Cal.3d at p. 405), nor is this duty delegable to third parties—including project applicants. (*Friends of the Eel River, supra,* 3 Cal.5th at pp. 712–713.) Indeed, the obligation to include "some consideration of feasible alternatives [applies] even if the project's significant impacts will be avoided through mitigation measures." (*Old Trees, supra,* 52 Cal.App.4th at p. 1395; *PANNA*, *supra*, 16 Cal.App.5th at p. 245.)

Here, the Commissioner failed to abide by any of these tenets, instead relying on cursory statements from permit applicants. The entirety of the alternatives analysis in his decisions consisted of (1) a passing reference to Alternatives and Mitigation Measures Considered Forms

submitted by the *growers*, (2) an acknowledgment that "resistant cultivars, sanitation practices, and site-specific management with soil treatments such as soil solarization, steam application, anaerobic soil disinfestation, soil substitution with soilless media, and use of naturally produced biocides" are potential alternatives to fumigants, and (3) conclusory claims that non-fumigant alternatives "are not effective or practical on the Central Coast…at this time," and that 1,3-D and chloropicrin "remain in most cases the only feasible and viable method of pest control available for pre-plant strawberry field preparation." (AR33–34.) The Commissioner provided no evidence supporting his conclusions regarding feasibility, instead gesturing at uncited "research." (AR33.)

The referenced forms are part of the permits but contain only the growers' assertions that they "adopted [alternatives] that are feasible and would substantially lessen any significant adverse impact on the environment." (AR288–289.) These statements—which cannot substitute for the Commissioner's own analysis—mechanically list between two and six possible "alternatives" for each pesticide without further explanation. (AR93–94, 637–638, 965–966, 1497–1498, 2125–2126, 4255–4256.) These bulleted lists of purported alternatives generally consist of one- to two-word entries, such as: "Sanitation," "Crop rotation," and "Mulch." (See AR49.) Together, the forms identify roughly 14 unique potential alternatives. (AR49.) There is also no information whatsoever about the potential environmental impact of pursuing the alternatives identified, precluding a meaningful comparison of alternatives.

The growers' assessments shed no light on these alternatives' feasibility. DPR's regulations define "feasible alternatives" as "other…procedures which can reasonably accomplish the same pest control function with comparable effectiveness and reliability, taking into account economic, environmental, social, and technological factors and timeliness of control." (3 CCR, § 6000.) Yet despite this definition being written directly on the growers' Alternatives Considered forms (AR95), no evidence in the record suggests that the 14 alternatives listed by the growers, or the subset of 7 alternatives mentioned by the Commissioner, have economic, environmental, social, technological, or timeliness factors that render them infeasible on the Central Coast (as alleged by the Commissioner) or in the specific circumstances contemplated in the six RMPs.

The Commissioner's unsupported and vague conclusions do not contain sufficient analysis to permit "informed decision making" (*Friends, Artists & Neighbors of Elkhorn Slough v. California Coastal Commission* (2021) 72 Cal.App.5th 666, 694–695) and do not disclose "the analytic route" he traveled "from evidence to action." (*Topanga*, *supra*, 11 Cal.3d at pp. 515–516.) In the absence of such data, the only reasonable inference is that the 14 listed alternatives are potentially feasible. (See *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 [Agencies have "the burden of environmental investigation" under CEQA and will "not be allowed to hide behind [their] own failure to gather relevant data," and "[d]eficiencies in the record may…lend[] a logical plausibility to a wider range of inferences"].)

The Commissioner's failure to acknowledge a "no project" alternative compounds the legal errors discussed above. DPR's own regulations explicitly required the Commissioner to consider the "no project" alternative. (AR5887; 3 CCR § 6432, subd. (a).) Yet neither the growers' application materials nor the Commissioner's post-hoc decisions on Petitioners' request for review even acknowledge such an alternative. The Commissioner's disregard for his duty to consider the consequences of denying the permits based on the circumstances described in each permit application speaks to his larger failure to carry out CEQA's mandate. (See *Planning & Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 911 [The no project analysis is necessary to help environmental decisionmakers understand "the environmental consequences of doing nothing" as a baseline for comparing project advantages and disadvantages.].)

Accordingly, the Commissioner's failure to meaningfully consider the feasibility of a reasonable range of alternatives and failure to consider the "no project" alternative amounted to a prejudicial abuse of discretion.

III. The CEQA Violations Discussed Herein Are Part of an Unlawful Pattern and Practice by the Agencies Warranting Declaratory Relief.

Based on the foregoing, there is an actual and present controversy over the overarching policies and practices of the Agencies concerning their obligation to conduct environmental review of RMPs—especially as to the nature of their obligation to consider cumulative impacts

and alternatives—making declaratory relief appropriate under CCP section 1060. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

This Court has discretion to grant declaratory relief "in cases of actual controversy relating to the legal rights and duties of the respective parties" (CCP, § 1060), including where the parties dispute the legality of an agency's policies. (*Californians for Native Salmon etc. Assn. v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1424–1425.) Petitioners bear the burden of demonstrating the existence of conditions that justify declaratory relief. (Evid. Code, §§ 115, 500.)

In *Native Salmon*, *supra,* 221 Cal.App.3d at pp. 1424–1425, plaintiffs challenged an alleged pattern and practice of the Department of Forestry in connection with a CEQA certified regulatory program, alleging that the Department had a policy of untimely responding to public comments and failing to address cumulative impacts in its review of timber harvest plans (THPs). Plaintiffs identified 65 THPs as illustrative of the alleged practice. (*Id.* at p. 1425.) The Court concluded it was reasonable to infer the Department's practice would continue, and would continue to be challenged, until the issue was resolved. The plaintiffs stated a cause of action for declaratory relief. (*Id*. at p. 1427.) Without declaratory relief, the issues would need to be presented in a large number of individual permit challenges, despite piecemeal litigation being disfavored. (*Id.* at pp. 1430–1431.)

While the ruling in *Native Salmon* occurred at the demurrer stage, the Supreme Court has granted declaratory relief on the merits for CEQA violations. (See generally *Protecting Our Water & Environmental Resources v. County of Stanislaus* (2020) 10 Cal.5th 479, 501–502 [holding that an agency's pattern and practice of categorically exempting a certain category of permits violated CEQA and entitled plaintiffs to declaratory relief].)

Here, in addition to demonstrating violations of the certified regulatory program in the specific context of the six challenged permits, Petitioners have produced evidence that the Agencies engaged in the same unlawful permitting practices in connection with 13 permits authorizing the application of RMs on 23 ranches in the 2022–2023 growing season, and 13 permits authorizing similar applications on 25 ranches in the 2021–2022 growing season.

(AR322–326, 51–56; PAR7963–8330.) As with the six permits discussed with specificity herein, these prior permits reflect only the *growers'* attestation of their environmental review as opposed to any environmental review by the *Commissioner*. Likewise, each of these permits is lacking in any reference to cumulative impacts, any explanation as to why the alternatives allegedly considered by the growers were infeasible, and any meaningful discussion of a "no project" alternative. Further, the federal civil rights dispute over disproportionate pesticide impacts to schoolchildren dating back to 1999 (AR4137–4196), and the UCLA research from 2019, discussed above, document an even longer history of these unlawful practices. (AR4197–4236.) And the Agencies' dismissive responses to Petitioners' requests for review and related appeals demonstrate a reasonable likelihood that this pattern and practice will continue in the future.

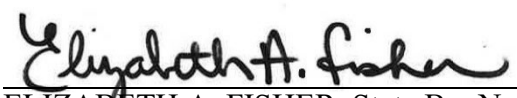
As in *Native Salmon*, it is reasonable to infer that the continuation of the Agencies' unlawful practices will lead to voluminous piecemeal litigation without declaratory relief. Accordingly, this Court should declare the Agencies' practices as to cumulative impacts and alternatives unlawful and require that they "demonstrate strict compliance" (*Mountain Lion, supra,* 16 Cal.4th at p. 132) with the CEQA certified regulatory program moving forward.

CONCLUSION

The Commissioner abused his discretion in issuing the six RMPs and DPR abused its discretion in ratifying the same. Petitioners respectfully ask the Court to reverse the six RMPs, declare the Agencies' RM permitting practices in violation of law, and remand to the Agencies with instructions to comply with CEQA prior to issuing further RMPs.

Respectfully Submitted,

DATED: February 12, 2025



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ADDENDUM

1. Exemplar Restricted Materials Permit: Permit 27-23-2700005, C&J Farms (Issued Aug. 9, 2023)

2. Exemplar Decision from Commissioner: Notice of Commissioner's Decision for Request for Review, C&J Farms (Aug. 30, 2023)

3. Maps Excerpted from Petitioners' First Amended Request for Review (Aug. 14, 2023)

PROOF OF SERVICE

I am a citizen of the United States of America and a resident of Contra Costa County, California; I am over the age of 18 years and not a party to the within entitled action; and my business address is 50 California, Suite 500, San Francisco, CA 94111.

Consistent with Monterey County Superior Court Local Rule 1.7, which mandates electronic filing in this case, and Rule 2.251(c)(3) of the California Rules of Court, which requires parties subject to electronic filing to accept electronic service from all parties, I hereby certify that on February 12, 2025, I served the attached PETITIONERS' AND PLAINTIFFS' OPENING BRIEF electronically via email as follows:

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I certify under penalty of perjury that the foregoing is true and correct. Executed on February 12, 2025, in San Francisco, CA.

Firenze Rodríguez